

## MEMORANDUM OF LAW

DATE: March 20, 1995

TO: Lawrence B. Grissom, Retirement Administrator

FROM: City Attorney

SUBJECT: Request for Early Retirement Incentive Program Benefits for  
Retiree Bill Nelson

### Question Presented

Absent action by the City Council, does the Board of Administration ("Board") for the San Diego City Employees' Retirement System ("SDCERS") have the authority to award a benefit to a member who does not meet the requirements set forth in the San Diego Municipal Code ("SDMC") for the award of that benefit?

### Short Answer

No. The City Council is vested with the exclusive authority to establish benefits. Although the Board is vested with the authority to administer the benefits, it does not have the authority to modify the terms and conditions of the benefit established by the City Council. This authority rests exclusively with the City Council.

### Background

Bill Nelson retired from the San Diego Police Department ("SDPD") effective September 25, 1992. Subsequent to his retirement, the City Council established a voluntary Early Retirement Incentive Program ("ERIP"), retroactive to September 1, 1992, which provided an additional two years of service credit for eligible employees. The window of opportunity for participation in the ERIP was from September 1, 1992, to January 4, 1993.

The requirements for ERIP are set forth in SDMC section 24.1013. To participate in the program, members meeting the stated age and service requirements were required to accept their accrued unused sick leave or annual leave in three installments, the first to be paid on July 1, 1993, with subsequent installments due on July 1, 1994, and July 1, 1995. SDMC Section 24.1013(d).

Forty-five members retired before the ERIP was established but within the window of opportunity. They were given written notice of their opportunity to participate in the program if they agreed to redeposit their accrued sick or annual leave and instead receive it in three installments as provided in the SDMC. Thirty-nine of the 45

individuals repaid the accrued unused sick and/or annual leave payout and were credited with two additional years of service credit. Four, including Mr. Nelson, indicated that they would not make repayment. Two did not respond.

Beginning January 18, 1994, the Retirement Administrator had numerous meetings with Mr. Nelson, Police Officers' Association ("POA") General Counsel Dick Castle, and the City's Labor Relations Manager, Larry Gardner. On July 13, 1994, the City Manager submitted a request to the Board to allow Mr. Nelson to pay the \$10,000 currently owed by him to receive the additional two years of service credit and be prospectively granted the higher level benefit.

The City Manager's request was considered by the Business & Procedures Committee on August 19, 1994. At that meeting, the issue of the reimbursement of interest on the money that would have remained in the City's General Fund was also discussed. Staff was directed to come back with a policy recommendation in September.

In September, staff reported that the interest loss was \$2,196.81. Repayment of this sum plus the principal would result in an increased benefit level to Mr. Nelson of \$208.00 per month. The full Board approved the request, i.e., the award of two additional years of service credit on a prospective basis with the stipulation that the interest the City would have earned on the remaining payout also be redeposited.

In November, the matter was again placed on the agenda of the Business & Procedures Committee in response to a letter received from Mr. Castle. Mr. Castle indicated that Mr. Nelson was prepared to reimburse the City for potential lost earnings (\$2,196.81) and the remaining one third of the accrued unused sick and annual leave payout (\$9,902.14). In return, Mr. Nelson now wanted the Board to grant him the enhanced benefit from the effective date of his retirement. The matter was continued to December.

In December, the matter was discussed at length. The Administrator indicated that the request presented by the POA was different than their initial request presented to the Board in November. Deputy City Attorney Lori Etherington advised the Business & Procedures Committee that ERIP was a Council created benefit and the Board had limited authority regarding the request. Board member Wilkinson recommended continuing this item to July, 1995, so that final installments could be paid to the other ERIP participants. Additionally, she recommended that staff be directed to prepare a report for the City Manager so that he could make the determination as to whether this would be a benefit he would wish to grant.

The Committee moved to continue the item to July, 1995, and to direct staff to prepare a report to forward to the City Manager's office. Staff was directed to include information in their report on the possibility of allowing other similarly situated individuals who

have not yet come forward, to receive the enhanced benefit, prospectively, commencing July 1, 1995. The Committee's recommendation was approved by the Board.

#### Discussion

The City Council is vested with the exclusive power, under the Charter for The City of San Diego ("Charter"), to establish benefits under the Retirement System. Charter section 146 authorizes the Council to "enact any and all ordinances necessary . . . to carry into effect the provisions of this Article." The Board is vested with the exclusive power under the Charter to administer these benefits.

With respect to the Board's authority to administer benefits, Charter section 144 expressly provides that the Board is "the sole authority and judge under such general ordinances as may be adopted by the Council as to the conditions under which persons may be admitted to benefits of any sort under the retirement system." Although at first glance it may appear that the Board has great latitude in this area, in reality the Board's power is limited by the requirements set forth in the Charter and the SDMC defining the benefit at issue. *Grimm V. City of San Diego*, 94 Cal. App. 3d 33 (1979).

In the instant case, the provisions of ERIP are at issue. According to SDMC section 24.1013, the ERIP was available on a voluntary basis to those members meeting certain age and service requirements between September 1, 1992, and January 4, 1993. If eligible, participation was dependent upon satisfying other requirements. Those included:

- 1) submitting a written application for retirement by January 4, 1993; and
- 2) actually retiring between September 1, 1992, and January 4, 1993; and
- 3) agreeing to accept payment for accrued unused sick or annual leave in three installments, the first to be received on July 1, 1993, with the subsequent installments due on July 1, 1994, and July 1, 1995.

Assuming all conditions were met, any member retiring during this window would receive two years of additional service credit. Additionally, the two year enhancement would count towards the calculation for the thirteenth check described in SDMC section 24.0404 and the City-sponsored Group Health Insurance described in SDMC section 24.1204(b).

Mr. Nelson did not meet the criteria established by the Council for the award of this benefit. He did not repay his accrued unused sick or annual leave payout as required by SDMC section 24.1013. Without more, he would not be eligible for the enhanced benefit. Neither liberal

construction nor creative administration will satisfy this statutory requirement.

Mr. Nelson's first request, however, as communicated by the City Manager, did initially appear to provide the ability to grant the enhanced benefit prospectively. Mr. Nelson had retired before the ERIP had been adopted by the City Council. He had already received and cashed his accrued unused sick and annual leave payout before the program was established. He had, however, indicated that he could not repay the money. The City Manager was willing to accept the return of the final sick leave/annual leave installment in return for the award of the enhanced benefit on a prospective basis. Recoupment of any interest lost to the General Fund was discussed and resolved satisfactorily to all concerned.

In light of the foregoing, we believe that, with respect to the specific facts and circumstances surrounding Mr. Nelson's initial limited request, the Board's administrative authority would allow the award of an enhanced benefit as initially proposed and approved by the Board. The same is not true, however, with the subsequent request to award the enhanced benefit retroactively to Mr. Nelson's retirement date. This request would substantially change the terms and conditions of the benefit as established by the City Council.

We have the same concerns with the further recommendation that this item be referred to the City Manager in July, 1995, for a determination as to whether the City Manager would want to grant this enhanced benefit to either Mr. Nelson or other similarly situated individuals who have yet to come forward. This proposed action is not within the City Manager's responsibilities. Such a determination lies exclusively with the City Council.

#### Conclusion

Mr. Nelson's request to the Board to receive an enhanced benefit retroactive to his retirement date, as outlined in this Memorandum of Law, alters the terms and conditions of the ERIP benefit established by the City Council. Although the Board is vested with the authority to administer the benefits established by the City Council, it does not have the authority to grant the relief sought. Since the City Council must approve any modifications to the terms and conditions of City Council created benefits, any change to ERIP necessary to accommodate Mr. Nelson's latest request must be forwarded to the City Council for its consideration.

Please contact me if you have any questions or if I can be of any further assistance.

JOHN W. WITT, City Attorney

By

Loraine L. Etherington

Deputy City Attorney

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ML-95-21